No. 89-1649

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

EDWARD I. ISIBOR,

Petitioner

V.

BOARD OF REGENTS OF THE STATE UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF THE STATE OF TENNESSEE, ET AL.,

Respondents

REPLY BRIEF OF THE PETITIONER TO THE BRIEF OF THE RESPONDENTS

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May 18, 1990

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TABLE OF AUTHORITIES

CASES CITED

REASONS FOR APPROVING THE WRIT

1.

REFUSAL OF TRIAL JUDGE TO RECUSE HIMSELF IN THIS CASE WARRANTS REVIEW BY THIS COURT IN ITS SUPERVISORY CAPACITY

The Respondents in their brief mischaracterize the Petitioner's argument on this assignment of error. Contrary to the Respondents' claim, Petitioner does not allege that the trial court's prior participation in the desegregation case of Geir v. Alexander, 593 F. Supp. 1263 (M.D. Tenn. 1984), required that the judge disqualify himself. Rather such a recusal was warranted in this case because of the expressed inability on the part of the trial judge to separate in his mind certain perceptions about petitioner and petitioner's proof from certain anti-desegregation forces external to the trial itself. The trial court expressed bias in this manner

"This court can't exclude from

> its mind the experience that it has had with desegregation efforts at Tennessee State University since I came on the bench in 1978. And the difficulties that have been experienced with a faction of people in this community and in the TSU Community who oppose the integration of TSU....."
> (TR III Court 342-347)

This charge was not introduced at trial by either the petitioner or the respondents. It was introduced into the case by the trial judge himself. The trial judge took a stance as that of a surrogate lawyer for the respondents, searching for a reasonable basis to justify the termination decision. On at least thirteen occasions, Judge Wiseman interrupted the testimony of petitioner's witnesses to inquire as to whether petitioner was also a member of the faction opposed to the desegregation efforts.[1]

[1] TR I -36 Line 19 to 25, TR II-276 Line 25
TR I -37 Line 1 to 25, TRII-278 Line 1-25
TR I -38 Line 1 to 13, TRII-282 Line 1-25
TR I -39 Line 19 to 25, TRIII-345 Line 13-25
TR I -40 Line 1 to 16, TRIII-346 Line 1-25
TR I -74 Line 1 to 25, TRIII-347 Line 1-18
TR II-275 Line 25

The trial judge was so entrenched in his bias against the petitioner that he left no room in his mind for the truth. For example during the testimony of Rev. Wallace Smith, the court asked this question repeatedly

"The Court:: Did you see him (Isibor) as representing a constituency that was interested in maintaining the Black identification of Tennessee State University?" (TR II - Court -276)

After the witness responded by saying "No, I think Dr. Isibor, as I understand it is quite a univeralist," (TR II - W. Smith - 278).

The trial court continued to display a contrary persuasion by stating

"I gather from your testimony that you saw him as representing a constituency in this dependent/independent black/white issue, that he represented a constituency that wanted to keep TSU black, is that right or not? (TR II-Court-278).

In light of the court's candid disclosure of its problem in objectively viewing the testimony of the petitioner's key witnesses it is ironic that the judge did not

recuse himself. Strong policy reasons require recusal in such situations:

> "(B)ecause of their positions of great public responsibility, District Judges often must walk a very narrow course in performance of their jobs on the bench. A District Judge---- must scrupulously avoid giving the parties or the public any basis for perceiving that he is deciding the case otherwise than pursuant to an application of controlling law to the facts and in the exercise of his impartial, independent, considered judgment." (No emphasis added).

Southern Pacific Communications Co. v. American Telephone and Telegraph, 7400 F. 2d 980, 984 (3rd Cir. 1984)

In its supervisory role, this court review is warranted to determine the source of the trial judge's charge that the petitioner belong to a faction opposing desegregation. Neither the petitioner nor any of his witnesses had ever appeared before Judge Wiseman in the Geir v. Alexander lawsuit. The petitioner only appeared before Judge Thomas Gray under a subpoena and he testified strongly in favor of integration. The respondent Board of Regents, and the Governor of the State

were against the merger of TSU (The Historically Black institution) and UTN (the Predominantly White institution). Also in his work, the petitioner produced the highest increase(3,260%) of the other race (white students) population at the School of Engineering and Technilogy under his deanship. The Petitioner, in addition, created the "Ebony and Ivory Scholarship Ball" to draw the total community together in support of the University.

There is a disturbing indication that the tainted impression of the petitioners case remained throughout the trial. For instance in the ruling of the trial court, there is a conspicuous absence of any mention of such key witnesses as Samuel Latham, Fred Humphries or Richard Lewis.

The respondents misquoted the record when they claimed the following statement is on record:

"Well, I don't know that I've said I

am going to disregard the other aspects of their testimony." On the contrary, the record as prepared by the trial courts' clerk stated as follows:

"The Court: Well, I don't know that --I've said I am going to disregard the other aspects of this testimony."

(TR III-Court-346-347)

The gap left in the record between "that" and "I've" was disregarded by the respondents in their brief. However the record shows several other instances in which the court threatened to ignore the testimonies of several witnesses of the petitioner. For example in (TR I-Court-103) the court said "I'm not going to consider any of that testimony Ms. Wayt". and in (TR I-Court-132) the court stated "All this, all this testimony will be stricken. Go ahead." The petitioner realizes that in a lawsuit irrelevant issues are expected to be stricken from the record. The only unusual thing is that the trial judge introduced in some irrelevant

issues to help the respondents and completely ignored key testimonies on the petitioner's side that he did not rule on as irrelevant.

Contrary to the respondents' claim the petitioner and his attorney did not know of the extent of the prior involvement of the trial judge with the state government and the local political network. The petitioner came to Nashville in 1975 and therefore was unaware that the trial judge was a democratic gubernatorial candidate in 1974. It is not normal for a litigant to carry out a discovery on the judge before trial when he was unaware of any justifying information. Therefore, the citied authorities such as Delesdenier v. Poterie, 666 F. 2d 116 (5th Cir.) cert. denied, 459 US 839 do not apply in this instance.

The petitioner does not assert that the trial judge ought to have recused himself simply because of his prior experience,

associations and viewpoints. But the petitioner asserts that such a recusal is expected if prior background creates a personal bias in the judge's mind that will obstruct justice. See Brody v. President & Fellows of Harvard College F2d 10 (1st. Cir. 1981), cert. denied, 455 US 1027 (1982).

Several issues can be cited in this case to demonstrate the actuality of bias on the part of the district judge. For instance, the respondents point to the Audit Report and the testimony of Connie Wilkinson to support their argument that about $59,000 was overspent on the General Electric grant. The sequence of events[2] in this case clearly demonstrates the bias of the trial judge.

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2 (a) On sept. 19, 1986, the petitioner wrote a letter to Cox requesting the requisitions that led to the alleged overexpenditure. (b) On Oct. 22, 1986, during a faculty meeting Dr. Chaudhuri

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This court is the only one in a position to serve the public good by providing an avenue for demanding production of the invisible requisitions that allegedly led to the overexpenditure. Therefore further review of the facts by this court is needed.

2.

THE COURT OF APPEALS ERRED IN RULING ON THE PETITIONER'S FIRST AMENDMENT CLAIM

The overiding theme of petitioner's speech involved the mismanagement of

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narrated how a false overexpenditure was declared on his NASA research grant, (c) Then on Nov. 3, 1986 faculty members sent a letter to Cox again demanding copies of the requsitions in question on the GE grant. (Page 0990 Joint Appendix) (d) Months went by and the requisitions were not produced. Therefore during discovery in this lawsuit, the petitioner demanded production of the requisitions. (e) The respondents refused to produce the document. Instead they filed a motion to the court not to be forced to produce the requisitions. (f) On sept. 7, 1988 Judge Wiseman, surprisingly, ruled that the respondents did not have to produce the requisitions with a condition when he said: "The Court:----For the present, I'm going to quash the subpoena duces tecum. And Ms. Wood is subpoenaed and if it becomes apparent that you're

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public university funds. This has been uniformly held to constitute a matter of public concern. The closest analogous case standing for this proposition is, of course, Pickering v Board of Education 391 US 563, 568, (1968). However, this threshold determination has been applied repeatedly to the University setting. See e.g., D'Andrea v. Adams 626 F. 2d 469 (5th Cir. 1980) (University professor protest-

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unfairly treated in this matter, Mr. Booker, I reserve the right to reverse the right to reverse myself.---." (g) Petitioners testimony in this regard was summarized as follows by the court: The Court: Yes, it was, but in your rebuttal proof, when Dr. Isibor raised it again and said the $59,000 that he never had overspent----he never had overspent a grant one nickel, and that was the reason he was demanding of the University Audit Office the requisitions for expenditures because he had'nt overspent one nickel. (TR VI - Court - 281). (h) On October 14, 1988 Judge Wiseman made his ruling from the bench and without any substantiating evidence (such as the requisitions) he said:

"It appears to the court that the overexpenditure resulted from requisitions originating in the office of Dr. Isibor himself." Dr. Isibor made requisitions and expenditures

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ing to state officials regarding the alleged improper use of university funds held protected even though no factual foundation existed for such allegations.) The petitioner also spoke out in regards to violation of the University hiring policy, the autonomy of the University and conflict-of-interest relationships. At trial, several faculty members, alumni, students and members of the general public testified that all the issues that the petitioner spoke on were public concerns and not personal issues.[3] These issues were discussed repeatedly on the news-media. The petitioner was invited on several occasions to share information regarding these issues with the public. Attempts to resolve them internally were unproductive. Even state officials were

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then against both of them. He well knew the answer to the question he continued to ask or he should have known the answer because he caused the problem himself."

uncooperative in this regard. For instance Prof. Elizabeth Wayt (a White lady with more clout) brought up a charge against Ron Dickson of fraud in the purchase of some computer equipment. She could not find anyone at tne State Board of Regents office to look into it. Then she contacted Mr. Frank Greathouse, the Auditor in the State Comptrollers office. In a telephone conversation, Prof. Wayt testified that Mr. Greathouse told her:

> "---that there would be no need to have an investigation; that he put Mr. Dickson at Tennessee State and he would go to the wall for him."
> (TR I Wayt 112)

The Trial Court and the Court of Appeals failed to consider the fact that the petitioner was a candidate for the

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Prof. Chaudhuri TRII - 238-240
(Student) Gregory Carr TRI-274-288
(Alumni) Ronnie Smith TRI-26-112
Dean Regina Monnig TRI 395
Prof. Ernest Rhodes TRII-187-190
Prof. Jacquelin Mitchell TRII-352-
Prof. Ray Richardson TRII-290-345
Rev. Wallace Charles Smith TRII-259-287
Prof. Elizabeth Wayt TRI-100-137

presidency at the university from 1985 to 1987. Therefore he made several political statements in regards to the university problems and what he would do to resolve them. The issue of fiscal management was the number one topic at the university and in the community. Respondent George Cox testified that all of the issues that the petitioner had raised were discussed publicly throughout the TSU campus and by all the finalists for the presidential position. (TR III Cox 479-482).

Moreover, even if it could be shown that petitioner was motivated purely out of some personal interest in making his remarks, such a finding would not serve as a constitutional basis for retaliation. Even where Myers' questionnaire was in large part of a personal grievance against her transfer, the United States Supreme Court stated in Connick v Myers, 461 U.S. 138 (1983) that her questionnaire "touch(ed) upon matters of public concern." Id at 154.

(There, one question out of fourteen touching a matter of public concern was held adequate to invoke constitutional protection.) The respondents are incorrect in claiming that "There is no specific instance of speech, no specific letter or statement, that petitioner points to as having supposedly caused his removal as dean." The petitioner had testified during trial that his outspokenness regarding the one million dollar investment and directed attention to his letter of Dec. 15, 1986 to Governor McWherter in which he charged state officials of conflict-of-interest relationship, mismanagement of funds and informed the governor of some "smoke" in higher education in the State of Tennessee that needs to be put out before it becomes a major disaster. These actions tilted the respondents to removing the petitioner from the deanship. Respondent Garland testified that senior members of his staff were very displeased regarding petitioner's comments

on how Mr. Ron Dickson (a former member of staff of the State Board of Regents) misinvested one million dollars of the University funds.

The record shows that the public good was served by the petitioner's persistence for the truth. The respondents regarded this as repetitive rehashing of issues without pointing out that the petitioner's persistence in his inquiry to allegations of mismanagement of funds proved well-founded since many of the pat answers provided by the administration were incorrect and misleading.[4] The petitioner was targeted for termination because he failed to acquiesce what is perceived as a negative image in the media at the expense of full disclosure on significant issues of public concern.

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[4] a. Through the petitioner's persistence the respondents admitted at trial that actually 4 million dollars was invested out-of-state with Brittenum and

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The Courts below relied heavily on Ron Dickson's vague perception that the petitioner's speech reduced the level of trust in him or his staff. Several factors discredit this vague perception and its use as a basis for the court's conclusion. First Ron Dickson himself testified that no one had ever indicated to him that plaintiff's speech on these issues reduced their level of trust in him or his staff. (TR IV ickson 485). Secondly the matter of fiscal mismanagement discussed by the petitioner was already a controversial issue and the subject to regular media commentary. All three candidates for Presidency of TSU spoke on fiscal mismanagement topics in their campaign. The Courts below ignored this fact. Respondent Otis Floyd spoke as much as the petitioner on this subject when

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Associates instead of the 1 million they had claimed earlier. (TR IV Dickson 486)
b. The uncollected or the actual loss of revenues on the video game contracts was first estimated by the respondents to be only 50 dollars, then the figure was changed repeatedly to 2500 dollars 2600 dollars and finally respondent Floyd established it to be about 80,000 dollars. (TR II Floyd 77)

he was a candidate for the presidency. Thirdly Dickson was singled out (in his position as the Vice President for Fiscal Affairs at TSU) by several groups and individuals as being at least partially responsible for one million dollar misinvestment. Ron Smith, the local president of the TSU alumni wrote and spoke publicly in this regard (Page 955 to 961 Joint Appendix). Also the Nashville Rainbow Coalition under the leadership of Rev. Fuzz wrote letters investigating the million dollar misinvestment. (Page 951 to 954 Joint Appendix). Thus Ron Dickson had reason to feel that the level of the community's perception of the integrity or competence of his office had declined.

Finally the court's emphasis on this testimony to support its finding on this point is misplaced. Ron Dickson was not in the category of personnel with whom the petitioner was required to deal with on a daily basis. To borrow from the

reasoning in Pickering, the petitioners employment relationship with Dickson was "not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary for their proper functioning" 391 U.S. at 570

The respondents did not dispute the testimonies cited by the petitioner from the record in which both respondent Cox and respondent Floyd declared that the alleged mistreatment of personnel as irrelevant to their decision to terminate the petitioner. (See TR I Cox 359-360) and (TR VI Floyd 68). The reliance of the courts below on this issue in making their rulings therefore justifies a review by the Supreme Court. Respondent Otis Floyd testified, both, on page 136 of his deposition and in (TR II Floyd 72) during trial that he had no just cause that could have led him independently to remove Dr. Isibor as dean, absent Dr. Cox's recom-

mendation to do so on May 29, 1987. Therefore the record is devoid of letters of reprimand on the alleged "ongoing pattern of abusive behavior" claimed by the respondents.

3.

THE COURT OF APPEALS ERRED IN DENYING PETITIONER RELIEF UNDER TITLE VII

The respondents in their brief did not dispute the fact that the testimony of respondent Roy Nicks that was cited is on the record. The Court of Appeals and the Trial Court erred in failing to consider this testimony. First, Nicks asserted that salary decisions for engineering deans were based on a study conducted in 1979-1980, (TR V Nicks) and that he found a degree of comparability between the engineering programs at TSU and MSU. Second, Nicks answered questions in these words:

"Q. And that based on that, you had approved Dr. Isibor's salary being equal to the Memphis State

dean's salary in 1981-82

A. Yes

Q. And again the following year

A. Yes" (TR V Nicks - 138) (Emphasis Added)

Third, Nicks admitted that without any justifiable reason the salary of the Memphis State Dean was made higher in later years than that of the petitioner. This change was not warranted by a new study. (TR V Nicks-139)

CONCLUSION

For all of the foregoing reasons a writ of certiorari should be issued to review the judgement of the United States Court of Appeals for the Sixth Circuit.

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